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NO. 197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

CROMPTON-HIGHLAND MILLS, INC.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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INDEX.

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
I. The facts	4
II. The Board's decision and order	13
III. The proceeding in the court below	15
Specification of errors to be urged	17
Reasons for granting the writ	18
Conclusion	31
Appendix	32

AUTHORITIES CITED.

Cases:

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	27
Craddock-Terry Shoe Corporation, Matter of, 73 N. L. R. B. 1339	23
W. W. Cross and Company, Matter of, 77 N. L. R. B., No. 188, 22 L. R. R. M. 1131	21
Exposition Cotton Mills Company, Matter of, 76 N. L. R. B., No. 183, 21 L. R. R. M. 1319	21
Franks Bros. Co. v. *National Labor Relations Board*, 321 U. S. 702	26
Federal Trade Commission v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257	27
Jeffery-DeWitt Insulator Co. v. *National Labor Relations Board*, 91 F. 2d 134, certiorari denied, 302 U. S. 731	23, 24, 25
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	19, 20
National Labor Relations Board v. *Acme Air Appliance Co., Inc.*, 117 F. 2d 417	28

	Page
National Labor Relations Board v. *American Potash and Chemical Corp.*, 98 F. 2d 488	29
National Labor Relations Board v. *Bachelder*, 125 F. 2d 387	28
National Labor Relations Board v. *Burke Machine Tool Co.*, 133 F. 2d 618	28
National Labor Relations Board v. *Cleveland-Cliffs Iron Co.*, 133 F. 2d 295	28
National Labor Relations Board v. *Condenser Corp.*, 128 F. 2d 67	28
National Labor Relations Board v. *Draper Corp.*, 159 F. 2d 294	28
National Labor Relations Board v. *Gerling Furniture Mfg. Co.*, 103 F. 2d 663	28
National Labor Relations Board v. *L. H. Hemel Leather Co.*, 135 F. 2d 71	28
National Labor Relations Board v. *Hills Bros. Co.*, 161 F. 2d 179	29
National Labor Relations Board v. *Clinton E. Hobbs Co.*, 132 F. 2d 249	28
National Labor Relations Board v. *Sands Mfg. Co.*, 306 U. S. 332	22
National Labor Relations Board v. *Lettie Lee, Inc.*, 140 F. 2d 243	29
National Labor Relations Board v. *McLain Fire Brick Co.*, 128 F. 2d 393	28
National Labor Relations Board v. *National Garment Co.*, 166 F. 2d 233, certiorari denied, June 14, 1948, No. 785, Oct. Term, 1947	28
National Labor Relations Board v. *National Laundry Co.*, 138 F. 2d 589	29
National Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241	30
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261	27
National Labor Relations Board v. *Pure Oil Co.*, 103 F. 2d 497	29
National Labor Relations Board v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, certiorari denied, 313 U. S. 595	24, 25
National Labor Relations Board v. *Swift & Co.*, 129 F. 2d 222	29
National Labor Relations Board v. *Toledo Desk & Fixture Co.*, 158 F. 2d 426	28
Southern Prison Company, Matter of, 46 N. L. R. B. 1268	21
Twenty-Three Southern Cotton Textile Companies, In Re, 21 War Labor Reports 793	5

STATUTES: Page

National Labor Relations Act (49 Stat. 449, 29 U. S. C. Secs. 151, *et seq.*):
Section 1 32
Section 7 33
Section 8 (1) 33
Section 8 (5) 19, 34
Section 9 34
Section 10 (e) 30
National Labor Relations Act, Section 10 (e), as amended by Section 101 of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. I, 141, *et seq.*) 34, 36
Federal Trade Commission Act (38 Stat. 717) 27
War Labor Disputes Act (57 Stat. 163, 167, 50 U. S. C. App. 1501, 1508) 7

MISCELLANEOUS:

H. Rep. 1371, 74th Cong., 1st Sess., p. 5 28
War Labor Board Guide Rates, August 25, 1945, 26 War Labor Reports XXIX 5

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on May 5, 1948 (R. 127), which denied the petition of the Board for enforcement of its order against Crompton-Highland Mills, Inc.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 124-126) is reported at 167 F. 2d 662. The findings of fact, conclusions of law, and order of the Board (R. 59-106) are reported at 70 N. L. R. B. 206.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 5, 1948 (R. 127). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

QUESTIONS PRESENTED

1. Whether an impasse in bargaining negotiations between an employer and the statutory representative of the employees justifies the employer in subsequently increasing the employees' rates of pay, without consultation or bargaining with the Union, in an amount greatly in excess of that proposed by the employer during the bargaining negotiations which had terminated a short time previously.

2. Whether an employer's subsequent compliance with an order of the Board justifies a circuit court of appeals in refusing to enforce the Board's order.

3. Whether, as a basis for denying enforcement of an order of the Board, a reviewing court may properly rely upon disputable assertions of fact as to compliance made by the employer, not contained in the record certified to the court by the Board and upon which the Board's order is founded, and without remand to the Board for its initial determination of the facts and its administrative judgment of their consequences.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act and its amendments are set forth in the Appendix, *infra*, pp. 32-36.

STATEMENT

Upon a second amended charge (R. 14-15), duly filed by the Textile Workers Union of America, C. I. O., hereinafter called the Union, the Board on January 31, 1946 issued its complaint alleging, among other things, that Crompton-Highland Mills, Inc., hereinafter called the employer, had on or about January 1, 1946, refused to bargain collectively with the Union as the exclusive representative of all the employees in an appropriate unit with respect to rates of pay and wages, in that, on or about that date, the employer did unilaterally grant wage increases to such employees (R. 12, 10-14). The employer filed an answer denying the allegation and setting forth affirmative matter in

defense (R. 24-27, 23). A hearing upon the complaint was held before a trial examiner of the Board on February 20 and 21, 1946 (R. 70). On March 25, 1946, the trial examiner issued his intermediate report (R. 69-104). On August 21, 1946, the Board issued its decision and order (R. 59-64), which it amended on August 26, 1946 (R. 110-111), and corrected on September 5, 1946 (R. 112-113). The pertinent facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

I. The Facts

In the conduct of its business of manufacturing, selling, and distributing cotton cloth (R. 71; 10, 24), the employer engages about 630 production and maintenance workers (B. A. 41), about one third of whom are paid in accordance with an incentive wage plan, and the remainder of whom are paid on the basis of a straight, hourly wage rate (R. 74; B. A. 51, 14, 20, 22, 157, 115). On August 13, 1945, following an election conducted under Board auspices at which a majority of the production and maintenance employees voted in favor of representation by the Union, the Board certified the Union as the exclusive bargaining representative of the production and maintenance employees who com-

[1] In the following statement record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

prise an appropriate unit (R. 72-73, 100; 11-12, 24; B. A. 27-29).

Ensuing negotiations between the Union and the employer were conducted on August 31, September 12 to 14 and 26 to 28, October 17 to 18, November 7 to 8, and December 19, in 1945 (R. 76, 77; B. A. 32, 36-37). At the outset of negotiations, the Union submitted a proposed contract to the employer which included a request for a general wage increase (R. 76; B. A. 136-149, 3). In addition to the establishment of a minimum hourly wage rate of 65 cents, the contract proposed that a "properly balanced and aligned wage structure" "based on the key occupational wage rates established as guide posts" in the February 20, 1945 Directive Order[2] of the National War Labor Board be negotiated, and that, upon the completion of negotiations and approval of the rate structure, a general increase of ten cents per hour to all employees be granted (R. 76; B. A. 145-146, 3).[3]

At the October 18 meeting, when the Union and the employer "really got into a discussion of the

[2] *In re Twenty-Three Southern Cotton Textile Companies*, 21 War Labor Reports 793.

[3] The War Labor Board guide rates, set by the Southern Textile Commission on August 25, 1945 to clarify the Directive Order (26 War Labor Reports XXIX), comprised hourly wage rates established for key occupational classifications in Southern textile mills designed to afford a basis upon which to negotiate wage adjustments in the Southern textile industry (B. A. 79).

issue" (B. A. 34), the employer rejected the Union's wage proposal in all respects (R. 88; B. A. 14, 62-63). Disclaiming inability to pay as the reason for its rejection (B. A. 34), the employer resisted the wage request upon the asserted ground that its wage scale was presently higher than the prevailing rate in the locality and industry (R. 90; B. A. 6, 16, 17, 37, 54-55, 74). It averred that the average hourly earnings of the employees were already in excess of the War Labor Board guide rates (B. A. 16, 55, 65-66). In professing to find the wage demand unjustified, the employer protested that "It has always been among the first to make wage increases in the community and it always means to be among the first to make wage increases in this community if it can" (R. 90; B. A. 74, 6, 16, 17, 37, 54-55). As its single affirmative contribution, the employer presented to the Union a schedule of its current wages, and it was emphatic that this schedule "was simply a statement of our current rates of pay and did not involve any wage increase whatsoever" (R. 78; B. A. 14, 106-108; 62-63, 69).[1]

Having failed to reach agreement upon wages and other issues, the Union deemed recourse to

[1] The schedule also contained a description of the hourly rated, straight-time occupations which the employer planned shortly to convert to incentive-rated jobs (B. A. 106-108). Apart from minor exceptions, the employer plans eventually to extend its incentive wage plan to embrace all its employees (R. 74; B. A. 50-51, 66-67, 121, 129).

strike action necessary, and on October 22, 1945, it notified appropriate state and federal government officials of its intention to strike (R. 87; 38-39, 5-15). In the usual course, a United States Conciliation Commissioner interceded in the dispute and meetings were held at his request in his office on November 7, continued through November 8, in order to resolve differences (R. 87-88; B. A. 39-40, 34, 61). At these meetings the Union reduced its request for a guaranteed minimum wage from 65 cents to 60 cents per hour, and it reduced its request for a general wage increase for all employees from ten cents to five cents per hour; it continued to request that the wage structure be aligned in accordance with the War Labor Board guide rates (B. A. 6, 150-151, 12). Notwithstanding the Union's concessions, the employer refused to grant any wage increase, reiterating in effect that its customary generosity could be relied upon to assure the grant of a wage increase when it deemed appropriate (R. 88, 90, 60; B. A. 6, 16, 17, 37-38, 63, 77, 89).

Thereafter, on November 27, in accordance with the War Labor Disputes Act,[3] a strike ballot was conducted at which the employees authorized strike action by a vote of 369 to 120 (R. 87; B. A. 40, 5). "Immediately after the strike vote," the membership of the Union "voted unanimously to place

[3] 57 Stat. 163, 167; 50 U. S. C. App. 1501, 1508.

further action" into the "hands" of the negotiating committee which was instructed "to meet again" with the employer "in a final effort to reach a settlement before actually taking strike action" (B. A. 5, 163, 64). Accordingly, the last of the series of meetings was held on December 19, at the Union's behest (R. 88; B. A. 5, 163, 64), at which time the Union presented to the employer "a recapitulation of [its] proposal of November 8 and put down in one place what amounted to about [its] total position on the wage question" (R. 91; B. A. 32, 152-153). At this time, as its first and only counterproposal, the employer offered to insert into the incentive wage plan the ten cents per hour which the incentive rated employees were presently receiving as a straight-time supplement to their wages. By operation of the incentive wage plan, this offer would amount to an increase of 1 to 1½ cents per hour for the incentive rated employees, about one third of the working force (R. 60, 88; B. A. 8-9, 18-19, 34, 39, 64, 72, 98, 99). Because "it did not begin to meet the increase requested by the Union and did not reflect needed conditions in the mill," the Union rejected this proposal (R. 60-61; B. A. 8).

On January 1, 1946, within twelve days of its refusal to consider during negotiations the grant of any wage raise beyond that contained in its limited offer, the employer announced a concededly "unilaterally determined" increase which substan-

tially equalled in amount the increase requested by the Union and which exceeded by far anything which the employer had theretofore offered to the Union (R. 61, 88-89; B. A. 105, R. 26-27; B. A. 11, 21-22, 33-34, 43-49, 74, 88, 92-95, 98-99, 100, 130-135).

Professedly actuated by a "rumor, more or less through the grapevine, that local mills were planning to make wage adjustments," the employer asserted that it "checked" and "found that wage adjustments were going to be made" at unascertained dates and in unascertained amounts, and it forthwith decided to grant a wage increase effective December 31, 1945 (R. 88-90; B. A. 92, 74-75, 94-95). Within the space of an hour on the afternoon of January 1, 1946, without prior notice, the employer summoned to its office the rank and file members of the Union's negotiating committee, but omitted to request the presence of the two Union officials who were chiefly responsible for the conduct of the negotiations on behalf of the committee (R. 88; B. A. 88, 43-44, 46, 93; 2, 32). At the same time that the committee's rank and file members were assembled in the office, the employer caused notices of the wage increase to be posted throughout the plant (R. 89; B. A. 49, 44-45, 46-47, 48-49). The introductory clause of the posted notices, read by the employer to the rank and file committee members during their ensuing ten minute audience, stated (R. 89; 44, 47-48, 131-135):

> In accordance with our past policy of being among the first to make wage adjustments when wage changes are being made in this locality, we take pleasure in announcing an increase in rates effective as of the starting of operations Monday morning, December 31st, 1945.

The employer also read to the committee a letter later mailed to Kenneth Douty, the Union's Georgia State Director, one of the two Union officials responsible for steering the committee's work (R. 88-89; B. A. 44, 33, 130). This letter stated:

> In the course of our extended contract negotiations we have repeatedly told you that our mill would be among the first to make wage adjustments in this locality. We have learned that certain of the mills in this locality are about to adjust their wage rates and we are, therefore, making comparable adjustments in our wage rates effective Monday, December 31st, 1945. A copy of the notice which has been posted in the mill today outlining the various rate adjustments is attached hereto.

Upon the completion of the announcement of the unilateral wage increase, the brief session with the members of the committee was ended, and the employer's representative later frankly testified that "the wage adjustment would have been made" notwithstanding "their objections" had they voiced any (R. 89; B. A. 94, 105).

The wage increase covered all production and maintenance employees with the exception of "scrubbers, sweepers and outside labor" (R. 88-89; B. A. 100, 131-134).[*] It amounted to an increase of from 4 to 5 cents per hour for straight-time, hourly rated employees (R. 88; B. A. 131-135, 100). It amounted to an increase of from 5 to 6 cents per hour for incentive-rated employees (R. 88; B. A. 131-135, 98-99).

At the conclusion of the last bargaining conference on December 19, apart from wages, the Union and the employer were in disagreement upon work assignments under the incentive wage plan, insurance provisions, severance pay, vacations, arbitration, union activity upon company time, the preamble to the contract, and union security (R. 88; B. A. 77-78). The employer's witnesses testified that Kenneth Douty, the Union's chief negotiator, had throughout the latter meetings maintained the position "that we might as well quit talking about a contract because he would never sign any contract, nor ever agree to any contract, irrespective of any other provisions of the contract, unless it included provisions satisfactory to him for the security and protection of the union and the collection of the Union's dues" (R. 90; B. A. 63, 64, 69,

[*] Shortly after the announcement of the wage increase, a sweeper who had received no increase complained to one of the members of the negotiating committee: "he wanted to know how come they didn't get a raise, and he said his flour cost him just as much a sack as mine did" (B. A. 47).

82-83, 91-92). Because of this, the employer assumed that the reopening of negotiations would be futile, and that resource to unilateral action was appropriate (R. 90; B. A. 93-94).

Doufy and five other members of the negotiating committee squarely denied, however, that the Union had at any time during negotiations made union security the indispensable precondition to agreement (R. 90-91; B. A. 80-84, 100-105).[7] Stating its belief that inclusion of union security in a contract was desirable "as a sign of good faith between the parties" (B. A. 80, 76), the Union, however, during negotiations pressed for "some form of union security" (R. 90; B. A. 80, 101). In its proposed contract submitted to the employer as a basis upon which to initiate negotiations, the Union had included a request for a union shop and check-off of dues and initiation fees (R. 76; B. A. 144). During the course of negotiations the Union progressively reduced its opening demand in successive stages from a request for a union shop to a provision for maintenance of membership, and at one point indicated a willingness to settle for the deduction of union dues upon the individual authorization of employees (R. 88; B. A. 80, 78-79,

[7] Doufy testified (B. A. 80): "Now we at no time stated that if we didn't get this particular element of the contract that we would have no contract at all. As far as we were concerned, the matter was open for bargaining all along the way on the issues we hadn't arrived at."

70¢.[8] The employer, however, refused to grant any form of union security (R. 88; B. A. 72-74, 78-79, 85, 89, 90).

II. The Board's Decision and Order

The Board found that the employer, "in violation of Section 8 (1) and (5) of the Act, failed to bargain collectively with the Union as the statutory representative of the . . . employees . . . by granting a wage increase to its employees without consulting the Union" (R. 60). By its conduct the employer failed to afford "the Union an opportunity to negotiate with respect to the amount of the increase, the employees to whom the increase would be applicable, the effective date of the increase or any of the factors normally envisaged in the collective bargaining process" (R. 89).

In summarizing the pertinent facts, the Board found that the employer, "during the course of negotiations with the Union, refused to accede to the Union's wage demands, and it was not until their last conference on December 19, 1945, that the [employer] made its first and only counterproposal of approximately 1 to 1½ cents an hour raise, which the Union rejected. Thereafter, the [employer] made no further effort to settle the wage dispute but, instead, on January 1, 1946, only 12 days later, granted its employees a substantially larger in-

[8] The Union also offered to provide the employer with clerical assistance in the deduction of dues (B. A. 73).

crease than that previously offered to the Union, without consulting the Union or affording it an opportunity to negotiate with respect thereto." The Board concluded that "such action, taken as soon after the Union was attempting through the bargaining process to reach an agreement with the [employer], among other things, on wages, clearly shows that the [employer] was not acting in good faith during the negotiations, and is manifestly inconsistent with the principle of collective bargaining" (R. 60-61).

The Board also rejected the employer's "attempted justification for its action on the ground that the Union broke off negotiations on December 19 and that the [employer] was therefore relieved of the obligation to deal with it" (R. 113, 61). The Board found that the employer concededly had "never proposed to the Union as a possible basis of agreement a wage increase comparable to that granted on January 1, 1946" (R. 113, 61). It stated that even if the Union and the employer "had reached an impasse in their negotiations, this obviously could not affect the Union's status as majority representative," and its consequent continuing "right to bargain with respect to such increase," which was materially in excess in amount and coverage from the increase proffered to the Union during negotiations. (R. 91-92).

With respect to the employer's contention that the Union's insistence upon union security pro-

cluded agreement upon a contract, the Board found that "the preponderance of the credible evidence does not support the [employer's] position that the Union had, in effect, presented an ultimatum that no contract would be consummated which did not afford union security" (R. 90-91), and that "the record fails to support the [employer's] contention that the Union's representatives assumed an unequivocal position at the last meeting which foreclosed further bargaining concerning wages or other terms or conditions of employment" (R. 61).

Finally, the Board ruled that neither anticipated wage increases by the employer's competitors in the labor market, nor the Union's taking of a strike vote, absolved the employer of its continuing duty to deal with the Union (R. 89-90, 92).

The Board entered an order requiring the employer to cease and desist from refusing to bargain with the Union "by taking action without prior consultation with said organization, with respect to rates of pay, wages, hours of employment" and "in any other manner interfering with the efforts" of the Union to bargain; upon request, to bargain with the Union; and to post appropriate notices (R. 62-64).

III. The Proceeding in the Court Below

On December 8, 1947, the Board filed in the court below a petition to enforce the Board's order (R.

1-5). In its answer to the Board's petition, dated January 10, 1948, the employer alleged (R. 121):

> "that since the hearing before the Trial Examiner and the issuance of the order sought to be enforced, [the employer] has bargained with the Union with respect to two general increases in wages and has reached tentative agreements with the Union with respect to all proposed provisions of a collective bargaining contract except the provisions, demanded by the Union, with respect to the security of the Union and the deduction of the Union's dues from the wages of the employees; and that on September 19, 1946, [the employer] offered to sign the contract which had been tentatively agreed upon in collective bargaining, and that the Union refused to sign said contract solely because [the employer] would not contract to protect the Union against the anticipated unwillingness of the employees to maintain membership in and pay dues to the Union"

In its brief to the court below (p. 49), the employer further averred that it "has fully complied with said Order, and that said order has fully served its intended purposes and is now stale."

On May 5, 1948, the court below issued its opinion (R. 124-126), and on the same day entered its judgment (R. 127), in which it denied the petition of the Board for enforcement of its order. The full discussion in the court's opinion states briefly (R. 125-126):

> . . . the only unfair labor practice found by the Board was the granting of a wage increase [by the employer] to its employees without consulting the Union.
>
> It appears, however, to be undisputed in the evidence of Mr. Douty, the representative of the Union in the State, that when the wage increase was granted collective bargaining had broken down, the Union had withdrawn from further bargaining in connection with the matter, and a strike vote had already been called. The evidence also seems to be without dispute that the raise in wages was made by the [employer] to meet competition by other mills in that section. Under these circumstances it does not appear to be an unfair labor practice to grant a general increase in wages to the employees without consulting the Union. On the strength of this view, and in the light of the earnest assertions by the [employer] that it has complied with the Board's previous order and has subsequently bargained with the Union in relation to two general increases in wages, the petition of the Board for enforcement of the order will be denied.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an impasse in bargaining negotiations between the employer and the statutory representative authorizes the employer to institute unilateral changes in rates of pay, different from

and in excess of those proposed by it to the statutory representative during negotiations.

2. In holding that the taking of a strike vote by the statutory representative authorize the employer to effectuate unilateral changes in rates of pay.

3. In holding that anticipated wage increases by competitors of the employer in the labor market authorizes the employer to effectuate unilateral changes in rates of pay.

4. In failing to accept the Board's findings that the employer had not bargained in good faith.

5. In relying upon compliance by the employer with the order of the Board as a reason for denying enforcement of the order.

6. In relying upon disputable assertions of fact made by the employer, not contained in the record certified to the court by the Board and upon which the Board's order is founded, as a basis for denying enforcement of the Board's order.

7. In failing to enforce the order of the Board.

REASONS FOR GRANTING THE WRIT

The decision of the court below permits unilateral employer action in circumstances which substantially impair the right to bargain collec-

tively guaranteed employees under the Act. Further, it impedes effective proscription of unfair labor practices by treating compliance with an order of the Board as grounds for denying its enforcement. In these important respects, the decision below is in conflict with decisions of this Court and the other circuit courts of appeals and presents questions of public importance in the administration of the Act. In addition, the court below erroneously relies upon disputable assertions of fact made by the employer, not part of the record certified by the Board to the court and upon which the Board's order is founded as a basis for denying enforcement of the Board's order.

1. Section 8(5) of the National Labor Relations Board Act requires an employer to bargain collectively with the representative of his employees. In *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, this Court held that an employer committed an unfair labor practice when it unilaterally, without consulting the bargaining agent, requested permission from the National War Labor Board to increase wages. There this Court stated (326 U. S. at 384-385):

> Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. * * *

> Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

In conflict with this principle, the decision of the court below permits the employer unilaterally to grant a five cents per hour increase in wages to substantially all its employees, the same amount requested by the Union and denied by the employer twelve days earlier, notwithstanding the fact that during negotiations the employer limited its offer of an increase to one and one half cents per hour for one third of the working force, a raise markedly less in amount and coverage from that unilaterally made. The crux of the decision below, therefore, is to sanction a unilateral wage increase in excess of the wage offer submitted by the employer to the Union during negotiations. Because the wage increase unilaterally made had never been proferred by the employer to the Union for acceptance, rejection, or modification through the collective bargaining process, it stands as an alteration of employment conditions effectuated without antecedent bargaining in relation to it. In consequence, the employer's conduct, permitted by the court below, contravenes the principle expressed by this Court in the *May Department Stores* case proscribing "Employer action to bring about changes in

wage scales without consultation and negotiation with the certified representative of its employers."

The court below relies for its contrary conclusion upon the ground that "when the wage increase was granted collective bargaining had broken down, the Union had withdrawn from further bargaining in connection with the matter, and a strike vote had already been called" (R. 125). The error of the court lies in its misconception of the circumstances countenancing unilateral conduct. After an employer and the exclusive bargaining representative have bargained to an impasse in good faith upon wages or other terms of employment, the employer may unilaterally institute those changes which the statutory representative after notification and consultation found unacceptable.[*] The collective bargaining obligation does not require congealment of the employment structure if the employer and the

[*] *Matter of W. W. Cross and Company*, 77 N. L. R. B. No. 188, 22 L. R. R. M. 1331 (where the union effectively demonstrates to the employer that there is no possibility of reaching an agreement on wages through the normal process of collective bargaining in the event that the employer is unwilling to grant the union's wage demands in full, the employer may unilaterally grant the lesser increase to which it is willing to accede); *Matter of Exposition Cotton Mills Company*, 76 N. L. R. B. No. 183, 21 L. R. R. M. 1319 (announcement by employer of an eight cent increase after its rejection by the union); *Matter of Southern Prison Company*, 46 N. L. R. B. 1268, 1269 (grant of individual wage increases after the union refused to bargain as to individual increases and insisted upon a general increase).

exclusive bargaining representative cannot after good faith negotiation strike a bargain. Conversely it necessarily excludes, if it is to retain its force, the institution of unilateral changes different from or in excess of those which through submission to the collective bargaining process have been tested and proven by genuine negotiation to be an inadequate basis for mutual accord.

In the circumstances of this case, the employer's grant of the same wage increase, one and one-half cents to one-third of the working force, offered to and found unacceptable by the Union after negotiation, would have constituted permissible unilateral conduct. But where, as here, the wage increase granted was in excess of that offered to the Union, the impasse in negotiations did not condone unilateral action beyond that upon which negotiations had deadlocked. As to such a new proposal, the situation is the same as if there had been no bargaining. An impasse cannot be presumed to continue as a barrier to agreement after the conditions which induced it may have been dissipated by the employer's own determination to make a significant change in his position. A genuine impasse reflects the futility and condones the discontinuance of further bargaining so long as the circumstances impelling the deadlock remain unchanged,[10] but when the circumstances which induced the impasse have

[10] Cf. *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342-343.

materially changed, the basis for the impasse ceases to exist and suspension of negotiations and unilateral action in reliance upon it is no longer justified. Accordingly, where, as here, an employer by his action changes the status of the negotiations, it becomes the employer's affirmative duty to reinstitute bargaining and "to submit any wage offer that if desired to make to the certified bargaining representative for negotiation; absent such submission, an impasse with respect thereto could not have been reached". *Matter of Craddock-Terry Shoe Corporation*, 73 N. L. R. B. 1339, 1342.

In failing to limit the employer's right to act unilaterally after a bargaining impasse to a matter on which the parties had deadlocked, the decision below is in probable conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Jeffery-DeWitt Insulator Co. v. National Labor Relations Board*, 91 F. 2d 134 (C. C. A. 4), certiorari denied, 302 U. S. 731. In the latter case, the employer refused to reinstitute negotiations with the union upon its request because efforts to bargain about a month earlier "had resulted in failure and an impasse in the negotiations had been reached" (91 F. 2d, at 139). In the interval, however, "the status of the controversy had undergone considerable change . . ." (*ibid*). In sustaining the Board's view that the employer had refused to bargain collectively, the Fourth Circuit held in substance that "the statute enjoining

collective bargaining would largely fail of its purpose" were "the failure of negotiations to result in agreement in June" deemed to so clearly preclude "the possibility of agreement in July under the changed circumstances then existing" as to warrant discontinuance of further negotiations (91 F. 2d, at 140). In like fashion in the instant case, "the statute enjoining collective bargaining would largely fail of its purpose" if unilateral employer action may be predicated upon an impasse the basis of which may be dispelled by the very circumstance that the employer is presently willing to grant an advantage which it earlier withheld, and which was material in the bargaining situation inducing the deadlock. Unlike the Circuit Court of Appeals for the Fourth Circuit, however, the court below failed to perceive that unilateral employer action, like the refusal to reinstitute bargaining, cannot be justified by an impasse which is spent by changed circumstances.

The decision of the court below, in its condonation of unilateral action in reliance upon the fact that "a strike vote had already been called" (R. 125), is in probable conflict with both the *Jeffery-DeWitt* case and the decision of the Circuit Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874 (C. C. A. 1), certiorari denied, 313 U. S. 595. The necessary premise of the court below is that the bargaining agent's plan to resort to strike action to

enforce its requests diminishes the employer's consequent duty to abstain from unilateral conduct. Both the First Circuit and the Fourth Circuit have held, however, that *actual* recourse to strike action does not relieve the employer of its continuing duty to negotiate with the statutory representative and to respect its status (118 F. 2d, at 885-887 (C. C. A. 1); 91 F. 2d at 140 (C. C. A. 4)). *A fortiori*, in the instant case, the statutory representative's unimaterialized plan to strike does not affect its status. On the contrary, the period preceding a strike is one during which intensified efforts to explore the potentialities for accord through collective bargaining must be exhausted in order to accomplish the purpose of the Act to avoid or mitigate needless industrial strife.

Finally, the court below parenthetically justifies the employer's unilateral action upon the ground "that the raise in wages was made by the [employer] to meet competition by other mills in that section" (R. 125). But this circumstance did not require the employer to act unilaterally.[47] There is no reason to believe that consultation with the union as to the granting of this increase would have caused undue delay; and if it did, a statement of

[47] The employer did not contend that the information as to forward wage adjustments in competing mills constrained it to effectuate a *unilateral* wage increase. Its position was rather that the Union's insistence upon union security purportedly made resort to collective bargaining futile, and in consequence conferred recourse to unilateral action.

the employer's intention to grant any increase ultimately adopted retroactively would have protected the interest of the employer and the employees.

2. In denying enforcement of the Board's order, the court below, without particularization, relied upon "the earnest assertions by the [employer] that it has complied with the Board's previous

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In addition to the Board's position that an impasse does not justify unilateral employer action in a form in excess of the proposals offered by the employer during the negotiations culminating in the deadlock, the Board found, as an alternative ground for decision, that the employer had not been bargaining in good faith during the negotiations. The Board inferred lack of good faith from the speedy grant of the unilateral wage increase in substantially the same amount requested by the Union and denied by the employer only twelve days earlier. It seems too plain for anything but statement that an employer may not frustrate the collective bargaining process by its failure to negotiate in good faith, and then "profit from a stubborn refusal to abide by the law" (*Franks Brothers Company* v. *National Labor Relations Board*, 321 U. S. 702, 706) by instituting unilateral changes in employment relations in reliance upon a resultant impasse. We do not rely upon the failure of the court below to accept the Board's finding as to this issue as ground for certiorari, but we reserve the right to rely on the finding if the case is heard on the merits.

Nor did the court below advert to the employer's contention that its unilateral action upon wages was justified because of the Union's purported unequivocal position that it would not consent to any agreement, whatever its terms, which did not contain a provision for union security, a matter to which the employer would not accede. The Board had disposed of this contention upon the factual ground that the Union had not in fact foreclosed agreement by unbending insistence upon union security. See pp. 14-15, 11-13, *supra*.

order and has subsequently bargained with the Union in relation to two general increases in wages." (R. 126). In *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271, this Court explicitly held that compliance with the Board's order is without relevance to the propriety of its enforcement. There this Court stated that "an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made." Notwithstanding discontinuance of the proscribed practice through voluntary compliance, the Board is "entitled to bar its resumption" by invoking compulsive judicial power in aid of its order. Compare: *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 236; *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260.

To permit respondents to defeat enforcement of Board orders by showing compliance after issuance of the order and the closing of the record would result in an endless cycle of litigation and impair the workability of the act. The conference report shows that Congress deliberately omitted from the National Labor Relations Act language contained in the original Federal Trade Commission Act (38 Stat. 717, 720), which had been construed by some circuit courts of appeals as "requiring the Commission to show in every case that

its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order". (H. Rep. 1371, 74th Cong., 1st Sess., p. 5.)

In conformity with the National Labor Relations Act's purpose and the decision of this Court, the other circuit courts of appeals have uniformly held that discontinuance of the proscribed conduct through voluntary compliance with the Board's order is immaterial to its enforcement and have refused to litigate questions of compliance as a condition precedent to entry of an enforcement de-

[15] Illustrative of the decisions in the Circuit Courts are the following cases:

First Circuit: *National Labor Relations Board* v. *Draper Corporation*, 159 F. 2d 294, 297; *National Labor Relations Board* v. *L. H. Hamel Leather Co.*, 135 F. 2d 71, 72-73; *National Labor Relations Board* v. *Clinton E. Hobbs Co.*, 132 F. 2d 249, 252.

Second Circuit: *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 421.

Third Circuit: *National Labor Relations Board* v. *McLain Fire Brick Co.*, 128 F. 2d 393, 394; *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 81.

Sixth Circuit: *National Labor Relations Board* v. *Toledo Desk & Fixture Company*, 158 F. 2d 426; *National Labor Relations Board* v. *Burke Machine Tool Co.*, 133 F. 2d 618, 619; *National Labor Relations Board* v. *Cleveland Cliffs Iron Co.*, 133 F. 2d 295, 300.

Seventh Circuit: *National Labor Relations Board* v. *Bachelder*, 125 F. 2d 387, 388; *National Labor Relations Board* v. *Gerling Furniture Manufacturing Co., Inc.*, 103 F. 2d 663.

Eighth Circuit: *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233, 239, certiorari denied,

cree.[13] The decision of the court below, in its reliance upon compliance as a basis for denying enforcement of the Board's order, conflicts with decisions of this Court and the other circuit courts of appeals and entails seriously detrimental consequences to the Act's enforceability.

3. Assuming compliance with the Board's order to be generally material to its enforcement, the court below is in further error in accepting as fact the employer's assertions with respect to its compliance and in presuming without preliminary recourse to the Board's administrative judgment that compliance is relevant to deny enforcement in the special circumstances of a particular case.

The employer's averments as to its compliance are contained in its brief and in its answer to the Board's petition for enforcement. They are not part of the record certified by the Board to the court below and upon which the Board's order is based. The danger of accepting such unilateral as-

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June 14, 1948, No. 785, Oct. Term, 1947; *National Labor Relations Board* v. *Swift & Company*, 129 F. 2d 222, 224.

Ninth Circuit: *National Labor Relations Board* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 250 (C. C. A. 9); *National Labor Relations Board* v. *American Potash and Chemical Corp.*, 98 F. 2d 488.

District of Columbia: *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590.

For prior decisions in the court below in accord with these views, see, *National Labor Relations Board* v. *Hills Bros. Co.*, 161 F. 2d 179, 180; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497.

sertions, unsupported by evidence, is plain. In this case, a representative of the Union sought during the oral argument before the Board an opportunity to deny the employer's assertion that it had bargained in good faith since the closing of the record. (Transcript of oral argument before the Board, pp. 25-26, 29).

Moreover, in its acceptance of the employer's unsupported averments outside the record, the decision below conflicts with this Court's decision in *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 249-250. There this Court stated that "The statute expressly deprives the reviewing court of power to consider facts thus brought to its attention. The case must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in § 10 (e) of the Act." Section 10 (e) of the Act, as amended, in substantially the same terms as prior to the amendment, permits the court to remand a proceeding to the Board in certain circumstances for the taking of additional evidence and the entry of new findings. Acceptance by the court of respondent's bare assertions without remand to the Board to ascertain the facts effectively defeats the statutory objective of reposing the fact-finding function in the Board and of according finality to its conclusions within the scope of permissible review.

Apart from the failure to remand to the Board for the ascertainment of the facts as to compliance, the court below was in equal error in failing to remand to secure the Board's administrative judgment of the consequences of compliance in the special circumstances of the particular case. Assuming the general materiality of compliance status as a condition precedent to obtaining an enforcement decree, each case presents individual problems as to the extent to which compliance makes entry of a decree enforcing the Board order necessary.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
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General Counsel,
National Labor Relations Board.

August, 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. § 151, *et seq.*) are as follows:

* * * * *

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial dis-

putes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

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[SEC. 10] (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such

person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

The relevant provisions of Section 10 (e) the National Labor Relations Act, as amended by Section 101 of the Labor Management Relations Act, 1947 (Act of June 23, 1947, c. 120, 61 Stat. 136, 29 U. S. C. Supp. I, 141, *et seq.*) are as follows:

* * * * * *

* * * If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

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